79-883

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

BERTRAM ZWEIBON, *et al.*,

Petitioners,

v.

JOHN N. MITCHELL,

Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINION BELOW

The opinion of the court of appeals, reproduced in the appendix to the government's petition in this case, is not yet reported. The opinion of the district court is reported at 444 F. Supp. 1296.

JURISDICTION

The opinion of the court of appeals was filed on July 12, 1979. On October 2, 1979, Mr. Chief Justice Burger extended petitioners' time for filing a petition for a writ

of certiorari to and including December 9, 1979 (App. A, p. 1a, *infra*). Ths jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether the civil damage remedy granted by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2520, may apply to warrantless "national security" wiretaps conducted after the law was enacted but before this Court's decision in *United States v. United States District Court*, 407 U.S. 297 (1972), and before the decision of the court of appeals in *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975).

2. Whether plaintiffs who have successfully litigated an unprecedented theory of civil liability may be denied the benefits of that new theory on the ground that the new ruling is not to apply retroactively.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §2520 provides:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person –
>
> (a) actual damages but not less than liquated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
>
> (b) punitive damages; and
>
> (c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

STATEMENT

Petitioners are individuals who were members of, or associated with, the Jewish Defense League ("JDL"). In October 1970 and between January and July 1971, the respondent, while he was Attorney General, directed the installation and operation of a warrantless wiretap on a number of telephones in the New York offices of the JDL. Petitioners were allegedly overheard during these wiretaps. Petitioners instituted this action in 1971, alleging that the wiretaps violated the Fourth Amendment as well as Title III of the 1968 Omnibus Crime Control and Safe Streets Act. The defendants[1] moved for summary judgment on the ground that the wiretaps were "national security" surveillances which could lawfully be installed without a judicial warrant. The district court granted the motion *(Zweibon v. Mitchell*, 363 F. Supp. 939 (D.D.C. 1973)). In a lengthy opinion, a majority of the court of appeals, which sat *en banc*, reversed *(Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975)). Petitioners sought a writ of certiorari from this Court to review the "good faith" defense which the court of appeals permitted under its decision, but the petition was denied. *Zweibon v. Mitchell*, 425 U.S. 944 (1976).

On remand, the district court again granted summary judgment for the defendant, this time on the ground that the conclusion that "national security" wiretaps required a warrant should not be applied to civil damage suits

[1] The original complaint named the FBI agents who listened to the conversations as defendants along with the former Attorney General. The FBI agents have since been dropped as defendants, and they are no longer parties to this action.

growing out of wiretaps installed and operated before this Court's decision in *United States v. United States District Court*, 407 U.S. 297 (1972), and before the court of appeals' 1975 decision in this litigation. *Zweibon v. Mitchell*, 444 F.Supp. 1296 (D.D.C. 1978).[2]

The court of appeals again reversed. It held that the constitutional claim under the Fourth Amendment could be retroactively applied because the 1972 decision of this Court and the court of appeals' 1975 decision "did not announce a new principle of law, but simply applied the constitutional warrant requirement to national security situations." With regard to petitioner's claim under the 1968 Act, however, the court of appeals denied retroactive effect to its 1975 ruling on the ground that the statutory question was "one of first impression, and was quite complex, involving sophisticated analysis of *Keith* and of the legislative record."

REASONS FOR GRANTING THE WRIT

1. If this Court grants respondent's petition, pressed on his behalf by the Solicitor General, to review the decision of the court below giving retroactive effect to the Fourth Amendment ruling in the 1975 *Zweibon v. Mitchell* decision, it should also grant this petition to review the *denial* of retroactive effect to the statutory aspect of the 1975 decision. The questions of statutory construction relating to Title III of the 1968 Act turned on very similar considerations to those which resulted in the constitutional ruling. Congress was aware of the direction of this Court's decisions in the 1960's, and it adopted the 1968 Act in light of constitutional standards. Hence

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[2]After the initial remand, the district court also struck petitioners' demand for a jury trial. The court of appeals reversed that ruling on petitioners' request for issuance of a writ of mandamus. *In re Zweibon*, 565 F.2d 742 (D.C. Cir. 1977).

neither the judicial construction of the Fourth Amendment nor the judicial construction of the statute presented the sharp breaks with past precedent which justify limiting the 1975 decision to prospective effect.

Moreover, contrary to the suggestion of the court below that the availability of the constitutional remedy affords sufficient opportunity for redress to the petitioners, there are real and substantial detriments that flow from the decision below. *First*, the liquidated damages remedy provided by 18 U.S.C. §2520 is an important element in any possible lawsuit, and the effect of the decision below is to leave its applicability to this case in serious doubt. *Second*, the refusal to apply the "procedural requirements" of Title III to a wiretap which was conducted more than two years after the law was enacted simply because no court had yet ruled on its application to these facts substantially diminishes the protection afforded by the 1968 Act and the availability of a meaningful remedy for the petitioners. The "procedural requirements" of Title III should have been followed if the Attorney General decided to tap the JDL phones, and petitioners should be entitled to recover such damages as were authorized by the 1968 Act for any failure to follow these requirements.

2. The refusal of the court below to grant to the petitioners the benefit of the ruling which they arduously sought and won in the landmark case they instituted conflicts with the approach to prospectivity taken by this Court in its prospectivity rulings. See, *e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *United States v. Wade*, 388 U.S. 218 (1967). Even though each of these new rulings was ultimately declared non-retroactive, this Court did not apply the prospectivity principle to the prevailing party in the very case which established the new rule. Obviously, to deprive a prevailing party in such a case of the benefit of

the legal rule he sought and secured would have the effect of removing the principal incentive to bring and maintain civil actions in which unprecedented theories of liability are asserted.

CONCLUSION

For the foregoing reasons, this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1979

APPENDIX

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. A-272

Betram Zweibon, *et al.*,

Petitioners,

v.

John N. Mitchell

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 9, 1979

/s/ Warren E. Burger

Chief Justice of the United States.

Dated this 2nd
day of October, 1979

No. 79-883

In the Supreme Court of the United States

OCTOBER TERM, 1979

BERTRAM ZWEIBON, ET AL., PETITIONERS

v.

JOHN N. MITCHELL

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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MEMORANDUM FOR THE RESPONDENT

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1. The facts of this case and a description of the decisions below are set forth in the Statement to our petition in No. 79-881. We note the following with respect to the additional issues raised in the cross-petition.

a. This case has been before the court of appeals on more than one occasion. In its first decision, the court of appeals reversed an award of summary judgment for the respondent, holding that the Fourth Amendment requires prior judicial authorization for national security electronic surveillance unless the target of the surveillance is an agent of, or a collaborator with, a foreign power. 516 F. 2d 594, 614 (1975) ("*Zweibon I*") (plurality opinion); *id.* at 689 (Wilkey, J., concurring in part). A plurality of the court also held that "the procedures and remedies of [Title III of the Omnibus Crime Control and

Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*] completely occupy the wiretapping field except to the extent the President's powers were rendered constitutionally immune from the warrant procedure of the Fourth Amendment" (516 F. 2d at 666; emphasis deleted) and that the remedies of Title III are therefore applicable to unconstitutional national security surveillances. (*id.* at 671).[1] Under the plurality opinion, the provisions of Title III that provide for liquidated damages "at the rate of $100 a day for each day of violation," punitive damages, and attorney's fees (18 U.S.C. 2520) apply to any national security surveillance conducted in violation of a constitutionally-imposed warrant requirement.

b. On remand, the district court concluded that the decision of the court of appeals in *Zweibon I* should not be applied retroactively to the facts of this case. The court therefore granted respondent's renewed motion for summary judgment (79-881 Pet. 7-8; see 79-881 Pet. App. 35a-36a & n.5).

Although the court of appeals reversed other aspects of the district court's ruling (see 79-881 Pet. 8-9), the court of appeals agreed that its holding in *Zweibon I*

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[1]Judge Wright, writing for the plurality, concluded that "Congress intended that applicability of Title III procedures and remedies in the national security context be contingent upon further judicial pronouncements concerning the constitutional question reserved in *Katz*." 516 F. 2d at 671. In *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967), this Court expressly declined to rule on whether prior judicial authorization is required for national security electronic surveillances. In *United States* v. *United States District Court*, 407 U.S. 297 (1972), the Court concluded that a warrant requirement is applicable to national security surveillances involving purely domestic activity, but did not determine whether warrants are required for surveillance of foreign intelligence activities or domestic agents of or collaborators with foreign intelligence activities. *Id.* at 309 n.8.

that Title III applies to warrantless national security surveillances "represented the sort of sharp break in the law which should be restricted to prospective effect" (79-881 Pet. App. 20a). The court held, however, that Title III liability might nonetheless be established in this case if, on remand, petitioners can show that the surveillance was not primarily motivated by national security purposes but was instead motivated by the desire to obtain evidence for prosecutorial purposes (*id.* at 9a). See 79-881 Pet. 9 & n.6.

2. Under the decision of the court of appeals, the damages provisions of Title III would apply to any warrantless national security surveillance not involving foreign agents or collaborators conducted after June 23, 1975, the date of the court's opinion in *Zweibon I*.[2] Such surveillances conducted prior to 1975, however, would not be subject to the remedies set forth in Title III. For reasons other than those advanced in the cross-petition, we agree that the question whether Title III is applicable to the events underlying this litigation merits the consideration of this Court.

a. The court of appeals correctly recognized that its holding in *Zweibon I*—that Title III applies to warrantless national security surveillances—constituted "the sort of sharp break in the law which should be restricted to prospective effect" (79-881 Pet. App. 20a). In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107

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[2]Title III was amended by the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1797, which establishes specific procedures for conducting electronic surveillance for national security purposes. A surveillance conducted under the new Act has prompted a damage action against former Attorney General Bell that is now pending before the court of appeals. *Chagnon* v. *Bell*, No. 79-1232 (D.C. Cir.), on appeal from 468 F. Supp. 927 (D. D.C. 1979).

(1971), this Court held that retroactive application of substantive rules announced in judicial decisions is inappropriate (1) if the decision established a new rule of law by deciding an issue of first impression in a way not "clearly foreshadowed" by earlier decisions, (2) if retroactive application of the rule would not further its purpose or (3) if retroactive application would impose hardship or produce inequitable results. The court of appeals properly concluded that the factors identified in *Chevron Oil* counsel against retroactive application of the Title III ruling in *Zweibon I* to the facts of this case.[3]

b. Although the court of appeals correctly declined to apply its construction of Title III retroactively, we believe that the construction of Title III that the court adopted in *Zweibon I* is fundamentally in error. In *United States* v. *United States District Court*, 407 U.S. 297 (1972), this Court concluded, after an exhaustive review of the legislative history of Title III, that that legislation "does not attempt to define or delineate the powers of the President to meet domestic threats to the national security." *Id.* at 322. The Court held that, in enacting Title III, Congress "simply did not legislate with respect to national security surveillances." *Id.* at 306.

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[3]Petitioners claim that the Title III ruling in *Zweibon I* should be applied retroactively in this case because the new rule was adopted in the course of this litigation. But the decisions on which petitioners rely (Pet. 5) all involve cases in which criminal defendants successfully sought to establish new rules in the course of their defense to criminal charges. Retroactive application of newly developed rules in that context differs markedly from the situation here, where retroactive creation of personal damages liability in individual civil actions would be inconsistent with due process principles. See *Morales* v. *Hamilton*, 391 F. Supp. 85, 88-89 (D. Ariz. 1975); *Hiss* v. *Hampton*, 338 F. Supp. 1141, 1148-1149 (D. D.C. 1972) (three-judge court).

As the dissenting judges noted in *Zweibon I*, the court of appeals' holding that Title III creates a damages remedy for warrantless national security surveillances is directly at odds with this Court's conclusions in *United States* v. *United States District Court*. See 516 F. 2d at 693-699 (Wilkey, J., dissenting); *id.* at 706-707 (MacKinnon, J., dissenting).[4] Accordingly, in the event that the Court grants review, we will contend, as an alternative ground to support the court of appeals' judgment that Title III remedies may not be applied to the warrantless national security surveillance challenged in this case, that Title III is wholly inapplicable to such surveillances. The need to correct the court of appeals' misinterpretation of Title III has become pronounced due to the conflicting judgments that have resulted in the lower courts, some of which have followed and some rejected the *Zweibon I* decision.[5]

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[4]The legislative history supports the construction of Title III adopted by this Court in *United States* v. *United States District Court*. The Senate Report recognized that there would be occasions where "foreign affairs and internal security" concerns might "overlap" with "domestic criminal" concerns and noted that where such overlapping occurred the surveillance would fall "outside the scope of [Title III]." S. Rep. No. 1097, 90th Cong., 2d Sess. 94 (1968). The Court acknowledged this fact in commenting that Congress might properly consider different standards for national security surveillances than "those already prescribed for specified crimes in Title III." *United States* v. *United States District Court*, *supra*, 407 U.S. at 322. The Court noted that "the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency." *Ibid.*

[5]For example, two district judges in the same federal district court have reached different results under Title III in two cases involving the identical national security surveillance. *Burkhart* v. *Saxbe*, 448 F. Supp. 588, 605-607 (E.D. Pa. 1978) (following *United States* v. *United States District Court*, *supra*); *Forsyth* v. *Kleindienst*, 447 F. Supp. 192, 199-200 (E.D. Pa. 1978) (following *Zweibon I*). Subsequent proceedings in those cases have not resolved the

CONCLUSION

The petition (No. 79-881) and the cross-petition for a writ of certiorari (No. 79-883) should be granted.

Respectfully submitted.

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FEBRUARY 1980

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statutory issue (see *Forsyth* v. *Kleindienst*, 599 F. 2d 1203 (3d Cir. 1979)), and we have filed a petition for a writ of certiorari in those cases (No. 79-1120) only on the immunity issues decided by the court of appeals.

In *United States* v. *Smith*, 321 F. Supp. 424, 425 (C.D. Cal. 1971), the district court held that Title III is inapplicable to national security surveillances. In *Weinberg* v. *Mitchell*, 588 F. 2d 275 (9th Cir. 1978), the Ninth Circuit disagreed with any implication in *Zweibon I* that the remedies of Title III would apply to warrantless national security surveillances—such as those involved here—conducted prior to the 1972 decision in *United States* v. *United States District Court*. The court in *Weinberg* did not reach the question whether Title III would apply to warrantless national security surveillances conducted after 1972. 588 F. 2d at 276 n.2.

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